

**[J-004-98]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

MADISON CONSTRUCTION COMPANY,	:	No. 0021 E.D. Appeal Docket 1997
	:	
Appellant	:	Appeal from the Order of Superior Court
	:	entered June 20, 1996 at 4329PHL94
	:	reversing the Order entered on November
v.	:	17, 1994 in the Court of Common Pleas of
	:	Chester County, Criminal Division at 93-
	:	10875
THE HARLEYSVILLE MUTUAL	:	
INSURANCE COMPANY, NICHOLAS	:	
EZZI, BRIAN MURTAUGH, KELRAN	:	
ASSOCIATES, INC., AND EUCLID	:	SUBMITTED: January 13, 1998
CHEMICAL COMPANY,	:	
	:	
Appellees	:	

**DISSENTING OPINION**

**MADAME JUSTICE NEWMAN**

**DECIDED: July 27, 1999**

I respectfully dissent because I do not believe that the trial court developed a sufficient record upon which to determine the applicability of the pollution exclusion to the allegations set forth in Mr. Ezzi's Complaint. I am concerned that the trial court determined that Euco Floor Coat is not a pollutant without addressing the critical issue of the exact chemical composition of the product used at the Boeing/Vertol Helicopters facility and whether the fumes emitted from that product are a pollutant. As the Majority notes:

Included in the record is the Material Safety Data report prepared by Euclid Chemical Company for the product or products known by the trade names Floor Coat, Super Floor Coat, Rez-Seal, Pilocure, Super Pilocure and EucoCare. The

report notes that '[t]hese products **may** contain approximately 3-4% Xylene . . . , 2-3% Cumene . . . 40% Trimethylbenze [sic]. . . which are considered toxic chemicals, and 0.2 to 0.3 Styrene . . . , which is a suspected carcinogen.'

Majority Opinion at 11 (emphasis added). Without a factual determination of the composition of the specific product at issue, I do not believe that the trial court could have reliably held that either the product or its fumes are pollutants. Accordingly, the grant of summary judgment in favor of Madison Construction based upon the physical properties of Euco Floor Coat is inappropriate. Therefore, I would vacate the Orders of the Superior Court and trial court, and remand with instructions to consider the issues set forth in this Opinion.